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SECRETARY, BOARD OF  
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**BEFORE THE BOARD OF OIL, GAS, AND MINING**

**DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH**

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IN THE MATTER OF THE REQUEST	)	<b>MEMORANDUM IN OPPOSITION</b>
FOR AGENCY ACTION BY	)	<b>TO CO-OP'S MOTION TO</b>
PETITIONERS NORTH EMERY WATER	)	<b>EXCLUDE EVIDENCE</b>
USERS ASSOCIATION, HUNTINGTON-	)	
CLEVELAND IRRIGATION COMPANY,	)	DOCKET NO. 94-027
AND CASTLE VALLEY SPECIAL	)	
SERVICES DISTRICT	)	CAUSE NO. ACT/015/025-93B

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Petitioners North Emery Water Users Association Huntington-Cleveland Irrigation Company and Castle Valley Special Services District by and through their counsel of record, respectfully submit the following Memorandum in Opposition to Respondent Co-op Mining Company's Motion to Exclude Evidence on grounds of collateral estoppel.

**POINT 1**

**Respondent's Motion  
Is Not Timely and  
Should Be Disregarded**

Respondent waited until October 19, 1994, 5 business days prior to the hearing to file its Motion. Even then, if merely mailed, the Motion to Counsel for Petitioners and it was thus not received until mid-day on Thursday, October 20, 1994 leaving just 2½ business days prior to the hearing, which is set for 9:00 a.m. Tuesday, October 25, 1994, to respond.

The rules of procedure adopted by this Board, do not allow the filing of eleventh hour Motions. R645-105-200 requires that Motions be filed by the 10th day of the month of the hearing or two weeks prior to the hearing, whichever time period being greater. The last day for filing of Motions by the Respondent was therefore October 10, 1994.

On September 9, 1994, Respondent, obviously contemplating the filing of its Motion to exclude evidence, requested an extension until October 9, 1994 to file Motions.<sup>1</sup> This request was granted by the Board. However, Respondent failed to comply with the October 9, 1994 deadline and did not file its Motion to exclude evidence until ten days later. Since all of the facts upon which Respondent relied to file its Motion were known to it on September

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<sup>1</sup> Respondent was obviously confused regarding the procedural rules of this Board as it had until October 10, 1994 to file Motions without any extension. See R645-105-200.

9, 1994. The delay in filing said Motion was apparently calculated to be of tactical advantage to Respondent by not giving Petitioners adequate time to respond prior to the hearing.

The late filing of the Motion has prejudiced Petitioners who have not had a sufficient opportunity to prepare an adequate response. Therefore, Respondent's Motion must be summarily denied as not timely.

## **POINT II**

### **Respondent's Motion Is Not Well Founded**

Respondent seeks to expand the doctrine of collateral estoppel far beyond its well established limits. In essence, Respondent seeks to preclude common facts to two different claims.

The claim before this Board is that Respondent's mining activities and will, if the permit revision is sustained, impact the Water Sources of Petitioners' Bitch Spring and Big Bear Spring. Petitioners are not seeking to re-litigate any prior issue, but to bring to this Board the facts and evidence regarding the present issue which has never previously been before this Board.

As the Utah Court of Appeals recently held in Mackintosh v. Hampshire, 832 P2d 1298 (Utah App. 1992) the issue in the prior matter must be identical to the present issue for collateral

estoppel to apply.<sup>2</sup> In Mackintosh, the Appellate Court found no collateral estoppel even though the prior and subsequent issues were closely related and had arisen out of the same factual setting. Common facts to separate issues are not precluded when the subsequent issue is not precluded by collateral estoppel. In this case, the issues are separated by 3½ years and numerous new facts which have occurred during this elapse of time.

#### CONCLUSION


While Petitioners have not had an opportunity to submit a complete response to Respondents tardy Motion, it is clear that it is without merit. Petitioners are not re-litigating a identical issue to any issue which has been or could have been brought previously before this Board. In fact, the current issue could not have been brought in 1990 because the significant revision sought by Respondent was not before this board and the current facts as to interference did not yet exist.

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<sup>2</sup> Collateral estoppel also applies to issues which could and should have been brought in the prior matter but were not raised. Copper State Thrift and Loan v. Bruno, 735 P2d 387 (Utah App. 1987). Obviously this does not apply as the present interference claim could not have been brought four years ago.

DATED this 25th day of October, 1994.

**NIELSEN & SENIOR, P.C.**



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North Emery Water Users Association  
and Huntington-Cleveland Irrigation  
Company

**CERTIFICATE OF HAND DELIVERY**

I hereby certify that a true and correct copy of the foregoing  
**MEMORANDUM IN OPPOSITION TO CO-OP'S MOTION TO EXCLUDE EVIDENCE** and  
was hand delivered to the individuals listed below on this 25th day  
of October, 1994:

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